

Preliminary Hearings

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7.1 Scope Note

In child protective proceedings, the court must make two major decisions at a preliminary hearing: whether to authorize the filing of the petition and, if so, whether to order pretrial placement of the child. This chapter deals only with the procedures leading up to the decision to authorize the filing of the petition. The procedures governing the determination of whether the child should be in placement pending trial are covered in Chapter 8. As an alternative to placing the child outside the home, the court may order an alleged abuser to leave the child's home. The requirements for doing so are dealt with in Sections 7.19 and 7.20 of this chapter.

7.2 Purposes of Preliminary Hearings

*See Sections 6.11–6.15 for a discussion of preliminary inquiries.

If the petition is accompanied by a request for placement and the child is in temporary custody, the court must hold a preliminary hearing to decide whether to authorize the filing of the petition and whether to continue the child's out-of-home placement. If the petition does not request placement and the child is not in custody, the court may conduct a preliminary inquiry to determine an appropriate course of action. MCR 5.962(A) and MCR 5.965(A).*

*See Chapter 8 for a detailed discussion of placement of the child.

If the court authorizes the filing of the petition, it must then determine whether to return the child to the parent with or without conditions, or to order placement of the child with someone other than a parent pending a trial on the allegations in the petition. MCR 5.965(B)(10).*

7.3 Referees Who May Conduct Preliminary Hearings

The parties to a child protective proceeding have a right to have a judge preside at a hearing on the formal calendar. MCR 5.912(A). A preliminary hearing is not a hearing on the formal calendar. See MCR 5.903(A)(6).

Therefore, the court may assign a referee to conduct a preliminary hearing and to make recommended findings and conclusions. MCR 5.913(A)(1). A referee who conducts a preliminary hearing need not be a licensed attorney. MCR 5.913(A)(3).

*See Forms JC 09a and JC 09b.

Referees may administer oaths and examine witnesses, and, if a case requires a hearing and taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. MCL 712A.10(1)(b)–(c); MSA 27.3178(598.10)(1)(b)–(c).^{*} Referees cannot sign court orders. The hearing is informal. MCL 712A.17(1); MSA 27.3178(598.17)(1). Stenographic notes or other transcript shall be taken. *Id.* If a record is kept by a recording device, the tape is a permanent record of the court. MCL 712A.17a; MSA 27.3178(598.17a).

7.4 Time Requirements for Preliminary Hearings

The preliminary hearing must commence no later than 24 hours after the child has been taken into court custody, excluding Sundays and holidays, unless adjourned for good cause shown, or the child must be released. MCR 5.965(A).

*See Sections 2.2(A) and 2.12 for definitions of these terms.

Within 24 hours after the Family Independence Agency determines that a child was severely physically injured or sexually abused,^{*} the agency must file a petition seeking Family Division jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b). MCL 722.637; MSA 25.248(17). In such cases, the court must hold “a hearing on the petition” within 24 hours or on the next business day after the petition is submitted. MCL 712A.13a(2); MSA 27.3178(598.13a)(2).

7.5 Adjournments of Preliminary Hearings

The court rule governing preliminary hearings, MCR 5.965, contains two provisions that specifically allow for adjournment of a hearing. MCR 5.965(B)(1) allows the hearing to be adjourned to secure the attendance of the parent, and MCR 5.965(C)(1) allows for adjournment for up to 14 days to secure the attendance of witnesses or for other good cause shown.

7.6 Notice Requirements for Preliminary Hearings

Notice of a preliminary hearing must be given to the parent of the child as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone. MCR 5.920(C)(2)(b).*

*See Form
JC 02.

In addition, MCR 5.921(B)(1)(a)–(g) requires the court to ensure that the following persons are notified of each hearing:

- F the respondent. For purposes of a preliminary hearing in a child protective proceeding, “respondent” means the parent who is alleged to have committed an offense against the child. MCR 5.903(C)(8);
- F a parent or guardian, if any, other than respondent;
- F the attorney for the respondent;*
- F the child or the attorney for the child;
- F the petitioner;
- F the guardian ad litem or a party appointed pursuant to the court rules; and
- F any other person the court may direct to be notified.

*See MCR 5.965(B)(5). The respondent may not have an attorney at the first hearing, and the court may adjourn the hearing for the appearance or appointment of counsel if appropriate.

Note 1: Notice of a preliminary hearing is often given to a respondent custodial parent orally by a Child Protective Services Worker investigating alleged abuse or neglect of a child. Noncustodial parents may be given notice via telephone if they can be contacted.

Note 2: The court is required to appoint a “lawyer-guardian ad litem” for the child. In some circumstances, the court may also appoint an “attorney,” and/or a “guardian ad litem.” See MCL 712A.13a(1)(b), (e), and (f); MSA 27.3178(598.13a)(1)(b), (e), and (f). For purposes of a required notice, “attorney” includes “lawyer-guardians ad litem.” The appointment of counsel for a child is discussed in detail in Sections 7.10–7.13, below.

7.7 Notification of Noncustodial Parents

A noncustodial parent whose parental rights over the minor have not been terminated, must be notified of the first hearing on the petition in a child protective proceeding. MCR 5.921(C). The noncustodial parent must be personally served with notice of the hearing and a copy of the petition. See MCL 712A.12; MSA 27.3178(598.12), and *In re Miller*, 182 Mich App 70, 73 (1990).

Note: Notification of a noncustodial parent often occurs before the first hearing after authorization of the petition, not at the preliminary hearing, because the petition, which may contain the name and address of the noncustodial parent, is not available until the start of the preliminary hearing.

7.8 Notification of Putative Fathers

*See Section 9.12 for the applicable definitions and procedures.

If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4), the court may, in its discretion, take appropriate action as described in MCR 5.921(D). MCR 5.921(D).*

*See Section 5.11 for a detailed discussion of these notice requirements.

The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court must direct that notice be served on that person as provided in MCR 5.920. MCR 5.921(D)(1).*

Note: Form JC 04 (petition) allows for identification of the father as a putative father. The best practice is to begin steps to identify the biological father as early in the proceedings as possible.

7.9 Appointment of Attorney for Respondents

At the respondent's first court appearance, the court must advise the respondent of the right to retain an attorney to represent him or her at any hearing and that:

(i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and

(ii) if the respondent is not represented by an attorney, the respondent may request and receive a court-appointed attorney at any later hearing.

MCR 5.915(B)(1)(a)(i)–(ii) and MCL 712A.17c(4)(a)–(c); MSA 27.3178(598.17c)(4)(a)–(c).

If the respondent wants an attorney, and when it appears to the court, following an examination of the record, through written financial statements, or through other means, that the respondent is financially unable to retain an attorney, the court must appoint an attorney to represent the respondent. MCR 5.915(B)(1)(b) and MCL 712A.17c(5); MSA 27.3178(598.17c)(5).*

*See Form
JC 03.

The respondent may waive the right to an attorney, but the court shall not accept a waiver if the respondent is a minor and a parent or guardian ad litem objects. MCR 5.915(B)(1)(c) and MCL 712A.17c(6); MSA 27.3178(598.17c)(6).*

*See Form
JC 06.

If an attorney is appointed to represent the respondent, after a determination of the person's ability to pay, the court may enter an order assessing attorney costs against the respondent, the person responsible for the respondent's support,* or against money allocated from marriage license fees for family counseling services. An order assessing attorney costs may be enforced through contempt proceedings. MCR 5.915(D), MCR 5.903(A)(13)(b), and MCL 712A.17c(8); MSA 27.3178(598.17c)(8).

*For a minor respondent, the order may be against the person responsible for the support of the minor.

Note 1: Often the court will have counsel standing by for a respondent who wants counsel. The court will recess, allow counsel and respondent to talk, appoint counsel on the record, and resume the hearing.

An attorney appointed by the court to represent the respondent shall serve until discharged by the court. MCR 5.915(E), MCR 5.903(A)(13)(b), and MCL 712A.17c(9); MSA 27.3178(598.17c)(9).

Note 2: In cases where an alleged abuser is ordered to leave the child's home,* the person ordered to leave may not be entitled to court-appointed counsel if that person does not fall within the definition of "respondent." A "respondent" is the parent alleged to have committed an offense against the child, MCR 5.903(C)(8), and "parent" means only a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or custodian, other than a custodian of a state facility, a guardian ad litem, or a juvenile-court ordered custodian, MCR 5.903(A)(12). Thus, a "nonparent adult" or a parent's "partner" is not entitled to court-appointed counsel in these cases.

*See Sections 7.19, 7.20, and 7.23, below, for the procedures required to order an alleged abuser from the child's home.

*The provision for appointment of lawyer-guardians ad litem is effective March 1, 1999. See 1998 PA 480. See also 1998 PA 481–483 (appointment of lawyer-guardians ad litem in child protective, guardianship, and child custody proceedings), which are effective March 1, 1999.

*See Section 13.29.

*See Forms JC 03 and 07.

*See Section 7.13, below (appointment of guardian ad litem to assist court).

7.10 Appointment of Lawyer-Guardians Ad Litem for Children*

The court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the assistance of a lawyer-guardian ad litem. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). See MCL 712A.13a(1)(f); MSA 27.3178(598.13a)(1)(f) (“lawyer-guardian ad litem” is an attorney appointed under §17d of the Juvenile Code with the powers and duties set forth in that section; see Section 7.11, below). The court rule governing appointment of counsel, MCR 5.915(B)(2), requires that counsel represent the child at the preliminary hearing.

The appearance of a lawyer-guardian ad litem is governed by MCR 2.117(B). MCR 5.915(C).

When a lawyer-guardian ad litem is appointed to represent the child, after a determination of the person’s ability to pay, the court may enter an order assessing attorney costs against the person responsible for the child’s support, or against money allocated from marriage license fees for family counseling services. An order assessing attorney costs may be enforced through contempt proceedings. MCR 5.915(D), MCR 5.903(A)(13)(b), and MCL 712A.17c(8); MSA 27.3178(598.17c)(8).*

A lawyer-guardian ad litem appointed by the court to represent the child shall serve until discharged by the court. MCR 5.915(E), MCR 5.903(A)(13)(b), and MCL 712A.17c(9); MSA 27.3178(598.17c)(9). The court shall not discharge the lawyer-guardian ad litem for the child while the child is subject to the jurisdiction, control, or supervision of the court, the Michigan Children’s Institute, or other agency unless the discharge is for good cause shown on the record. If the court discharges the lawyer-guardian ad litem, the court must immediately appoint another lawyer-guardian ad litem to represent the child. MCL 712A.17c(9); MSA 27.3178(598.17c)(9).*

7.11 Powers and Duties of Lawyer-Guardians Ad Litem

In addition to any other powers and duties, a lawyer-guardian ad litem’s powers and duties include those prescribed in MCL 712A.17d; MSA 27.3178(598.17d). MCL 712A.17c(7); MSA 27.3178(598.17c)(7).

MCL 712A.17d(1); MSA 27.3178(598.17d)(1), states that the lawyer-guardian ad litem’s duty is to the child, and not the court.* The lawyer-guardian ad litem’s powers and duties include at least all of the following:

- (a) the obligations of the attorney-client privilege;*
- (b) to serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child;
- (c) to determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information;
- (d) before each proceeding or hearing, to meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the child's parents, foster care providers, guardians, and caseworkers;
- (e) to explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role;
- (f) to file all necessary pleadings and papers and independently call witnesses on the child's behalf;
- (g) to attend all hearings and substitute representation for the child only with court approval;
- (h) to make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences;*
- (i) to monitor implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose;
- (j) consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter; and
- (k) to request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

MCL 712A.17d(1)(a)–(k); MSA 27.3178(598.17d)(1)(a)–(k). See Michigan Rules of Professional Conduct, 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication) 1.6 (Confidentiality of Information),

*See Section 11.14 (lawyer-guardian ad litem may not be called as witness and case file not discoverable).

*See Section 7.12, below, for discussion of the appointment of an attorney where the lawyer-guardian ad litem and child disagree as to the child's best interests.

1.14 (Client Under a Disability), and 2.1 (Advisor). For further explanation of the rationale behind the recently passed legislation enacting these powers and duties, see Note, *Crafting an advocate for a child: in support of legislation redefining the role of the guardian ad litem in Michigan child abuse and neglect cases*, 31 U Mich J L Ref 237 (1997), and Benchnote 4.

The court may permit another lawyer-guardian ad litem to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if substitution would prevent the hearing from being adjourned, or for other good cause. MCR 5.915(B)(2)(d)

The lawyer-guardian ad litem substituting as counsel for the child must be familiarized with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the case file and consult with the foster parents and caseworker prior to the hearing unless the child's lawyer-guardian ad litem has done so and communicated that information to substitute counsel. The court must inquire on the record whether the lawyer-guardians ad litem have complied with these requirements. MCR 5.915(B)(2)(d).

The lawyer-guardian ad litem appointed to represent the child must receive compensation as determined by the court, including compensation for all out-of-court consultations as required by statute or court rule. MCR 5.915(B)(2)(e).

*The provision for appointment of attorneys for children is effective March 1, 1999. See 1998 PA 480.

7.12 Appointment of Attorney for the Child*

"Attorney" means an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan Rules of Professional Conduct. An "attorney" owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. MCL 712A.13a(1)(b); MSA 27.3178(598.13a)(1)(b).

*See Section 7.11, above, for discussion of the lawyer-guardian ad litem's determination of the child's best interests.

If, after discussion with the child, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem must communicate the child's position to the court. If the court considers appointment of an attorney appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney. The attorney, if appointed, serves in addition to the child's lawyer-guardian ad litem. MCL 712A.17d(2); MSA 27.3178(598.17d)(2).*

*See Section 13.29.

If an attorney is appointed to represent the child, after a determination of the person's ability to pay, the court may enter an order assessing attorney costs against the person responsible for the child's support, or against money allocated from marriage license fees for family counseling services.* An order assessing attorney costs may be enforced through contempt

proceedings. MCR 5.915(D), MCR 5.903(A)(13)(b), and MCL 712A.17c(8); MSA 27.3178(598.17c)(8).

An attorney appointed by the court to represent the child shall serve until discharged by the court. MCR 5.915(E), MCR 5.903(A)(13)(b), and MCL 712A.17c(9); MSA 27.3178(598.17c)(9). The court shall not discharge the attorney for the child while the child is subject to the jurisdiction, control, or supervision of the court, the Michigan Children's Institute, or other agency unless the discharge is for good cause shown on the record. If the court discharges the attorney, the court must immediately appoint another attorney to represent the child. MCL 712A.17c(9); MSA 27.3178(598.17c)(9).*

*See Forms
JC 03 and 07.

7.13 Appointment of Guardians Ad Litem*

A “guardian ad litem” is appointed by the court to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney. MCL 712A.13a(1)(e); MSA 27.3178(598.13a)(1)(e). The court may appoint a guardian ad litem for the child. MCL 712A.17c(10); MSA 27.3178(598.17c)(10).*

*See Form
JC 03.

*This statutory
provision is
effective March
1, 1999. See
1998 PA 480.

In addition, if the court finds that the welfare of the party requires it, the court may appoint a guardian ad litem for the party. MCR 5.916(A). “Party” includes the petitioner, child, respondent parent, or other parent or guardian. MCR 5.903(A)(13)(b).

MCR 5.916(B) requires the appearance of a guardian ad litem to be in writing and in a manner and form designated by the court. The appearance must contain a statement as to the existence of any interest that the guardian ad litem holds in relation to the minor, minor's family, or any other person in the proceeding before the court or in other matters. *Id.**

*See Form
JC 07.

The appearance entitles the guardian ad litem to be furnished copies of all petitions, motions, and orders filed or entered, and to consult with the attorney* of the party for whom the guardian ad litem has been appointed. MCR 5.916(C).

*The guardian
ad litem
presumably
may consult
with the
lawyer-
guardian ad
litem as well.

The court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party, and may enforce the order of reimbursement through contempt proceedings. MCR 5.916(D).*

*See Section
13.29.

7.14 Appearance of Prosecuting Attorney

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any proceeding. MCR 5.914(A). In addition,

if requested by the Family Independence Agency or an agent under contract with the FIA, the prosecuting attorney must act as legal consultant for the FIA or its agent at all stages of the proceedings. If the prosecuting attorney does not appear on behalf of the FIA or its agent, the FIA may contract with an attorney of its choice. MCL 712A.17(5); MSA 27.3178(598.17)(5).

*Contrast this definition with the definition in MCR 5.903(B)(5) (delinquency proceedings).

“Prosecuting attorney” means the prosecuting attorney of the county in which the court has its principal office or an assistant to the prosecuting attorney. MCR 5.903(C)(7).*

In *In re Jagers*, 224 Mich App 359 (1997), although the Family Independence Agency had retained independent legal counsel, the prosecuting attorney filed a petition alleging abuse and neglect. The Court of Appeals held that the prosecuting attorney has standing, independent of the Family Independence Agency, to file a petition in protective proceedings. *Id.*, at 362. MCL 712A.11(1); MSA 27.3178(598.11)(1), allows “a person” to give information to the court that may serve as the basis for the court’s assumption of jurisdiction. *Id.*, at 362–63. The Court also distinguished *In re Hill*, 206 Mich App 689 (1994), where the prosecutor was prevented from amending and supplementing petitions originally submitted by the FIA, which had obtained legal representation by the attorney general’s office. The public policy of protecting children supports allowing a prosecuting attorney to act independently of the FIA when they disagree on whether a petition should be filed. *Jagers, supra*, at 365.

7.15 Required Procedures at Preliminary Hearings

A. Attempt to Notify Parent

*See Form JC 02.

The court must determine if the parent has been notified.* If the parent is not present, the court must direct that an attempt be made to secure the presence of the parent. The preliminary hearing may be adjourned to secure the parent’s attendance, or the preliminary hearing may be conducted without the parent present. MCR 5.965(B)(1).

B. Required Presence of Lawyer-Guardian Ad Litem for Child*

*See Section 7.10, above, for a discussion of appointment of a lawyer-guardian ad litem for the child.

The child’s lawyer-guardian ad litem must be present at the preliminary hearing. The court may make temporary orders for the protection of the child pending appearance of counsel or pending completion of the hearing. MCR 5.965(B)(2).

C. Reading the Allegations in Petition

Unless waived, the court must read the allegations in the petition. MCR 5.965(B)(3).

D. Decision to Continue With the Hearing

The court must determine whether to dismiss the petition, refer the matter to alternative services, or continue with the hearing. If the petition is dismissed or the matter referred to alternative services, the child must be released. MCR 5.965(B)(4).

E. Required Advice of Rights

The court must advise the respondent:

F of the right to the assistance of an attorney pursuant to MCR 5.915,* and

*See Section 7.9, above.

F of the right to trial on the allegations in the petition, and that the trial may be before a referee unless the required demand for a judge or jury is filed pursuant to MCR 5.912 or MCR 5.913.*

*See Section 9.11.

MCR 5.965(B)(5)–(6).

F. Required Procedures for Cases Involving Indian Children

The court must inquire if the child or parent is a registered member of any American Indian tribe or band, or if the child is eligible for such membership. If so, the court must ensure that the petitioner notifies the tribe or band and follow the procedures in MCR 5.980.* MCR 5.965(B)(7). It is the petitioner's responsibility to notify the tribe or band, and the preliminary hearing is not adjourned for this purpose.

*See Chapter 20 for a detailed discussion of the required procedures.

G. Opportunity for Respondent to Admit or Deny the Allegations

The court must allow the respondent an opportunity to admit or deny the allegations and make a statement of explanation. MCR 5.965(B)(8).

7.16 Authorization of Filing of Petition

The court may authorize the petition to be filed at the conclusion of the preliminary hearing upon a showing of probable cause that *one or more* of the allegations in the petition are true and fall within the provisions of MCL 712A.2(b); MSA 27.3178(598.2)(b). MCL 712A.13a(2); MSA 27.3178(598.13a)(2), and MCR 5.965(B)(9). However, the factual allegations in the petition need not be *proven* at the preliminary hearing. See *In re Hatcher*, 443 Mich 426, 434–35 (1993) (at preliminary hearing, court must make “a finding of probable cause to substantiate that the facts alleged in the petition are true and that if proven at trial would fall under [MCL 712A.2(b); MSA 27.3178(598.2)(b)].”) In the analogous context of a preliminary examination in a criminal case, probable cause has been defined as “[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that

a person accused is guilty of the offense with which he is charged.” *People v Dellabonda*, 265 Mich 486, 490 (1933).

The evidentiary standards in MCR 5.965 applicable to the “probable-cause phase” of a preliminary hearing are undefined. Contrast this with MCR 5.935(D)(4), which provides that in a preliminary hearing in a delinquency case “a finding of probable cause . . . may be based on hearsay evidence which possesses adequate guarantees of trustworthiness.” MCR 5.965(C)(3), which allows the court’s findings regarding placement to be made “on the basis of hearsay evidence that possesses an adequate degree of trustworthiness[,]” may also apply to the court’s finding that probable cause does or does not exist to believe that the respondent committed an offense against the child. See MCR 5.962(B) (at preliminary inquiry, probable cause may be established “with such information and in such manner as the court deems sufficient.”)

In child protective proceedings, during the “probable-cause phase” of the preliminary hearing, the respondent must be given an opportunity to compel the testimony of and to cross-examine witnesses presented by the petitioner, to subpoena his or her own witnesses, and to offer proof to counter the allegations against him or her. MCR 5.965(C)(1). The court may permit the respondent to waive the probable-cause determination. MCR 5.965(C)(1).

Note: The “probable-cause” phase of a preliminary hearing may proceed in the following ways:

—**Respondent waives probable-cause determination:** if the respondent waives the probable-cause determination, the verified petition allows the court to authorize the filing of the petition. This is similar to the probable-cause “showing” at a preliminary inquiry. See MCR 5.962(B)(3) and MCL 712A.13a(2); MSA 27.3178(598.13a)(2). Alternatively, the court may swear in the petitioner and have the petitioner make a record, on information and belief, that the allegations in the petition are true.

—**Respondent does not waive probable-cause determination and witnesses are present:** if the respondent does not waive the probable-cause determination, the petitioner presents witnesses, the respondent cross-examines those witnesses, and the court makes its findings or adjourns the hearing to allow presentation of additional witnesses or evidence. If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition.

—**Respondent does not waive probable-cause determination and no witnesses are present:** if the respondent does not waive the probable-cause determination and no witnesses are present, the court may adjourn the hearing to allow presentation of witnesses. When the hearing resumes, if witnesses are presented, the procedures outlined immediately above apply. If no witnesses are presented, the court must dismiss the petition.

The court may allow amendment of the petition. A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6); MSA 27.3178(598.11)(6).

7.17 Required Indication of Whether Temporary or Permanent Custody Is Sought*

The court must indicate whether temporary or permanent custody of the child is sought and must direct that the respondent and the child's lawyer-guardian ad litem and attorney receive a copy of the petition authorized to be filed. MCR 5.965(B)(9).

*See Chapter 18 for discussion of proceedings to terminate parental rights (i.e., to obtain permanent custody of the child).

7.18 Placement or Release of the Child to a Parent, Guardian, or Custodian*

During the preliminary hearing, the court must determine whether to release the child to a parent, guardian, or custodian, or to place the child outside of the home. See MCR 5.965(C).

*See Section 8.1(B) for a detailed discussion of placement of a child when neglect is alleged.

7.19 Requirements to Order Alleged Abuser From the Child's Home*

As an alternative to placement of the child in foster care, the court may order a parent, guardian, custodian, "nonparent adult,"* or other person residing in a child's home to leave the home and, except as the court orders, not subsequently return to the home if all of the following take place:

*See Form JC 65.

(a) a petition alleging abuse of the child by the parent, guardian, custodian, "nonparent adult," or other person is authorized for filing by the court;

*The provisions affecting "nonparent adults" are effective July 1, 1999. See 1998 PA 530.

(b) the court after a hearing* finds probable cause to believe the parent, guardian, custodian, "nonparent adult," or other person committed the abuse; and

*See Section 7.16, above, for a discussion of the probable-cause finding at preliminary hearings.

(c) the court finds on the record that the presence in the home of the person alleged to have committed the abuse presents a substantial risk of harm to the child's life, physical health, or mental well-being.

MCL 712A.13a(4)(a)–(c); MSA 27.3178(598.13a)(4)(a)–(c).

"Abuse"* by a parent, guardian, custodian, or "nonparent adult," for purposes of this provision, is defined as one or more of the following:

*See Section 8.1(B) for a detailed discussion of placement of a child when neglect is alleged.

(a) Harm or threatened harm by a person to the child's health or welfare that occurs through nonaccidental physical or mental injury.

*See Section 2.2(A) for definitions of “sexual contact” and “sexual penetration.”

(b) Engaging in sexual contact or sexual penetration as defined in MCL 750.520a; MSA 28.788(1),* with a child.

(c) Sexual exploitation of a child, which includes, but is not limited to, allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in photographing, filming, or depicting a child engaged in sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

(d) Maltreatment of a child.

MCL 712A.13a(15)(a)–(d); MSA 27.3178(598.13a)(15)(a)–(d).

In determining whether to order a parent, guardian, custodian, “nonparent adult,” or other person from the home, the court may consider whether the parent who is to remain in the home:

F is married to the person to be removed from the home, or

F has a legal right to retain possession of the home.

MCL 712A.13a(6); MSA 27.3178(598.13a)(6).

The order removing a parent or person from the home may contain one or more of the following conditions:

(a) the court may require the alleged abusive parent to pay appropriate support to maintain a suitable home environment for the child during the duration of the order;

(b) the court may order the alleged abusive person, according to terms the court may set, to surrender to a local law enforcement agency any firearms or other potentially dangerous weapons the person owns, possesses, or uses;

(c) the court may include any reasonable term or condition necessary for the child’s physical or mental well-being or necessary to protect the child.

MCL 712A.13a(7)(a)–(c); MSA 27.3178(598.13a)(7)(a)–(c).

If the Family Independence Agency determines that a child was severely physically injured or sexually abused,* the court must consider at least the following:

F ordering the alleged abuser to leave the child’s home as described above; and

F regardless of whether the alleged abuser is ordered to leave the child’s home, ordering the child placed in licensed foster care unless the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child’s life, physical health, or mental well-being.

*See Section 2.24 for a discussion of petition requirements in such cases.

MCL 712A.13a(2); MSA 27.3178(598.13a)(2), MCL 712A.13a(4); MSA 27.3178(598.13a)(4), and MCL 712A.13a(5); MSA 27.3178(598.13a)(5).*

7.20 Warrantless Arrest of Persons Violating Orders Removing Them From Child's Home

If a peace officer has reasonable cause to believe all of the following, he or she may arrest the person violating an order removing the person from a child's home:

(a) the Probate Court (before January 1, 1998) or the Family Division has issued an order under MCL 712A.13a(4); MSA 27.3178(598.13a)(4) [order to parent, guardian, custodian, "nonparent adult," or other person to leave child's home],* stating on its face the period of time for which the order is valid;

(b) a true copy of the order and proof of service has been filed with the law enforcement agency having jurisdiction of the area in which the person with custody of the child resides;

(c) the person named in the order received notice of the order;

(d) the person named in the order is acting in violation of the order; and

(e) the order states on its face that a violation of its terms subjects the person to criminal contempt of court and, if found guilty, the person must be imprisoned for not more than 90 days and may be fined not more than \$500.00.

MCL 764.15f(1)(a)–(e); MSA 28.874(6)(1)(a)–(e).

The arresting officer must provide one copy of the complaint to the court that ordered the person from the home. MCL 764.15f(2)(b); MSA 28.874(6)(2)(b).

The person arrested must be brought before the Family Division having jurisdiction of the cause within 24 hours after the arrest to answer to a charge of contempt for violation of the order. MCL 764.15f(3); MSA 28.874(6)(3).* The Family Division judge must then:

(a) set a time certain for a hearing on the alleged violation of the order. The hearing must be conducted within 72 hours after arrest, unless extended by the court on motion of the person arrested;

(b) set a reasonable bond pending a hearing of the alleged violation of the order; and

*See National Council of Juvenile and Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* (Reno: University of Nevada, Reno), forthcoming.

*See Section 7.19, above.

*See Section 7.23, below, for discussion of penalties for violation of orders affecting "nonparent adults."

(c) notify the person having custody of the child and direct that person to appear at the hearing and give evidence on the charge of contempt.

MCL 764.15f(3)(a)–(c); MSA 28.874(6)(3)(a)–(c). If a Family Division judge is unavailable within 24 hours after arrest, the person must be taken before a district court judge, who must set a hearing before the Family Division that entered the order violated or that has jurisdiction over the order, and must set bond. MCL 764.15f(5); MSA 28.874(6)(5).

Orders and proofs of service must be entered into the Law Enforcement Information Network (LEIN). MCL 764.15f(6); MSA 28.874(6)(6). If an order is rescinded, the court must immediately order the removal of the protective order from LEIN. MCL 764.15f(7); MSA 28.874(6)(7).

7.21 Records of Preliminary Hearings

MCR 5.925(B) requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. “Formal calendar” means the judicial phases other than a preliminary inquiry or a preliminary hearing. MCR 5.903(A)(6). Thus, a record of a preliminary hearing need not be made by stenographic, mechanical, or electronic recording under the provisions of MCR 5.925(B).

A record of other hearings may be made and preserved by a written memorandum executed by the judge or referee setting forth findings and procedures followed. MCR 5.925(B).*

If a record of a hearing is made by a recording device, transcription of the hearing is unnecessary unless there is a request by an interested party. The recording remains a permanent record of the court. MCL 712A.17a; MSA 27.3178(598.17a).

Note: Although proceedings on the formal calendar do not include preliminary hearings, most courts do make recordings of their preliminary hearings. Also, MCR 5.965(C)(3) requires the court to make a written statement of findings or place them on the record if placement is ordered following a preliminary hearing.

7.22 Order After Preliminary Hearing

At the conclusion of the preliminary hearing, the court must make its findings and enter an order. See Forms JC 11 and JC 65.

7.23 Orders Affecting “Nonparent Adults”*

At a preliminary hearing, the court may issue an order that affects a “nonparent adult” and that does one or both of the following:

*See Forms JC 09a and JC 09b.

*These provisions are effective July 1, 1999. See 1998 PA 530.

- F permanently removes the “nonparent adult” from the child’s home,* and/or
- F permanently restrains the “nonparent adult” from coming into contact with or within close proximity of the child.

MCL 712A.6b(1)(c) and (d); MSA 27.3178(598.6b)(1)(c) and (d).

A “nonparent adult”* is a person 18 years old or older who, regardless of the person’s domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b):

- F the person has substantial and regular contact with the child;
- F the person has a close personal relationship with the child’s parent or with a “person responsible for the child’s health or welfare”; and
- F the person is not the child’s parent or a person otherwise related to the child by blood or affinity to the third degree.

MCL 712A.13a(1)(g)(i)–(iii); MSA 27.3178(598.13a)(1)(g)(i)–(iii).

A “nonparent adult” who violates an order issued by the court pursuant to §6b of the Juvenile Code is guilty of a misdemeanor punishable by imprisonment for not more than one year, a fine of not more than \$1000.00, or both. Subsequent violations are punishable as felonies by imprisonment for not more than two years, a fine of not more than \$2000.00, or both. Moreover, §6b of the Juvenile Code does not prohibit a “nonparent adult” from being charged with, convicted of, or punished for any other violation of law he or she commits while violating an order issued under this section of the Juvenile Code. MCL 712A.6b(2)–(4); MSA 27.3178(598.6b)(2)–(4).

In addition, the court may exercise its criminal or civil contempt powers for a violation of §6b of the Juvenile Code. MCL 712A.6b(5); MSA 27.3178(598.6b)(5).*

MCL 712A.6b; MSA 27.3178(598.6b), does not affect the authority or jurisdiction of the court to issue orders affecting adults under MCL 712A.6; MSA 27.3178(598.6). MCL 712A.6b(6); MSA 27.3178(598.6b)(6).*

*See Section 7.19, above.

*See also Sections 2.2(C) (investigation of suspected abuse or neglect), 3.4 (jurisdiction over “nonparent adults”), 13.21 (ordering “nonparent adult’s” compliance with Case Service Plan), and 16.11 (notice requirements).

*See Section 3.20.

*See Section 3.19.

